Yong Fui Phin v Lim Tow Siew

HIGH COURT (MELAKA) — DIVORCE PETITION NO 33-121-1995
AUGUSTINE PAUL JC
17 AUGUST 1996

Family Law *— Nullity — Non-consummation of marriage — Marriage was registered but parties did not go through customary marriage 'due to unforeseen circumstances' — Marriage never consummated — Whether marriage not consummated owing to incapacity or wilful refusal of party to consummate — Whether marriage voidable — Law Reform (Marriage and Divorce) Act 1976 s 70(a) & (b)*

Family Law *— Nullity — Non-consummation of marriage — Failure to disclose parties to the marriage resided in Malaysia at the time of the commencement of the proceedings — Whether fatal to petition for decree — Law Reform (Marriage and Divorce) Act 1976 s 67*

The petitioner was lawfully married to the respondent on 5 May 1995 at the Registry of Civil Marriages in Melaka. At the time of the registration of the marriage, it was mutually agreed that both parties would continue to live separately until a wedding ceremony under Chinese customary rites was celebrated at a later date. The petitioner filed a petition in the High Court against the respondent for a decree of nullity under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') on the ground that the marriage was not consummated as both parties did not go through the customary marriage due to unforeseen circumstances. The petition stated that the petitioner was ordinarily domiciled in Malaysia. The question was whether the petitioner was entitled to the prayer sought under the relevant provisions of the Act and the main issue for consideration was the grounds on which the petition was based.

Held, dismissing the petition:

(1) Pursuant to s 67(c) of the Act, the court may only make a decree of nullity where both parties to the marriage reside in Malaysia at the time of the commencement of the proceedings. In the present case, there was nothing on record, apart from the statement that 'the petitioner is ordinarily domiciled in Malaysia', to show that both the parties to the marriage resided in Malaysia at the time of the commencement of the proceedings. This was fatal to the petition (see pp 484F–H and 485B); *Cheng Sun Chuen v Lee Chee Seng* [1983] 2 MLJ 371 followed.

(2) A decree of nullity may be granted on the ground that the marriage is void as specified in s 69 of the Act, or when it is voidable under s 70 of the Act (see p 484E–F).

(3) Section 70 makes it manifestly patent that a marriage shall be voidable *only* on any of the grounds listed therein. In this case,

the relevant parts of s 70 are only sub-ss (a), under which a marriage shall be voidable where there is non-consummation due to the incapacity of either party to consummate it, or sub-s (b), where there is non-consummation by reason of the wilful refusal of the respondent to consummate it (see p 485G–H).

(4) Under s 70(a), the critical matter for consideration is the ability to have sexual relations and not the ability to procreate. The degree of sexual relationship required is capacity for *vera copula,* intercourse which is ordinary and complete, and not incipient, imperfect and unnatural. Whether the parties had had normal intercourse prior to the marriage was irrelevant. What was in issue was whether the parties had had intercourse after the marriage (see p 486A–C); *Baxter v Baxter* [1948] AC 274, *D v D* (1845) 1 Rob Eccl 279, *R v R* (otherwise *F*) [1952] 1 All ER 1194, *SY v SY* [1963] P 37 and *Dredge v Dredge* (otherwise *Harrison*) [1947] 1 All ER 29 followed.

(5) A contract of marriage implies that the parties have the capacity to consummate it. The word 'incapacity' in s 70(a) means the inability to have sexual intercourse based on physical abnormality or psychological impotence. It is immaterial that the respondent is capable of having intercourse with others. A spouse who suffers from invincible repugnance to the act of intercourse with the other may be regarded as incapable of consummating the marriage. A rational decision not to permit intercourse is insufficient and there must be some element of psychological or sexual aversion. It is for the petitioner to prove that the incapacity exists (see p 486D–F); *Dickinson v Dickinson* (otherwise *Phillips*) [1913] P 198, *L v L* [1956] MLJ 145, *W* (otherwise *K*) *v W* [1967] 1 WLR 1554 and *Singh v Singh* [1971] P 226 followed.

(6) In the present case, the petitioner did not disclose any evidence of incapacity of the parties to consummate the marriage. The available evidence only indicated that there was no consummation of the marriage due to unforeseen circumstances. That on its own did not bring the non-consummation within the ambit of s 70(a) (see p 486H).

(7) As for a petition under s 70(b) of the Act, the petitioner must show wilful refusal to consummate the marriage. For there to be a wilful refusal, there must be a refusal to consummate without just excuse. A petition based on wilful refusal must be dismissed if the respondent can show a 'just excuse' for the refusal to consummate (see p 487B); *Horton v Horton* [1947] 2 All ER 871 and *Jodla v Jodla* (otherwise *Czarnomska*) [1960] 1 All ER 625 followed.

(8) In this case, the available evidence only disclosed that the marriage was not consummated as both parties did not go through the customary marriage due to unforeseen circumstances. This was insufficient to establish that the marriage was not consummated without just excuse (see p 487I).

[Bahasa Malaysia summary

Pempetisyen telah berkahwin dengan sahnya di sisi undang-undang dengan penentang pada 5 Mei 1995 di Pejabat Pendaftaran Perkahwinan Sivil di Melaka. Pada masa pendaftaran perkahwinan itu, adalah dipersetujui bahawa kedua-dua pihak akan terus tinggal berasingan sehingga upacara perkahwinan di bawah adat resam Cinadiraikan pada tarikh kemudian. Pempetisyen memfailkan suatu petisyen di Mahkamah Tinggi terhadap penentang untuk perintah pembatalan di bawah Akta Membaharui Undang-Undang (Perkahwinan & Perceraian) 1976 ('Akta tersebut') atas alasan bahawa perkahwinan tersebut tidak disempurnakan atas sebab keadaan yang diluar jangkaan, kedua-dua pihak tidak melangsungkan perkahwinan menurut adat resam. Petisyen itu mengatakan bahawa pempetisyen adalah pada kebiasaannya menetap di Malaysia. Persoalannya adalah sama ada pempetisyen berhak kepada permohonan yang dituntut di bawah peruntukan-peruntukan yang relevan Akta tersebut dan isu utama untuk dipertimbangkan ialah alasan-alasan yang mana petisyen itu berasaskan.

Diputuskan, menolak petisyen:

(1) Mengikut s 67(c) Akta tersebut, mahkamah hanya boleh membuat dekri pembatalan di mana kedua-dua pihak kepada perkahwinan bermastautin di Malaysia pada masa prosiding dimulakan. Dalam kes sekarang, tidak ada apa-apa dalam rekod —selain daripada kenyataan bahawa 'pempetisyen pada kebiasaannya menetap di Malaysia' — untuk menunjukkan bahawa kedua-dua pihak kepada perkahwinan itu menetap di Malaysia pada masa prosiding dimulakan (lihat ms 484F–H dan 485B); *Cheng Sun Chuen v Lee Chee Seng* [1983] 2 MLJ 371 diikut.

(2) Dekri pembatalan boleh diberikan atas alasan bahawa perkahwinan itu adalah batal seperti yang ditetapkan oleh s 69 Akta tersebut, atau apabila ia boleh dibatalkan di bawah s 70 Akta tersebut (lihat ms 484E–F).

(3) Seksyen 70 adalah dengan jelasnya mengatakan bahawa perkahwinan boleh terbatal *hanya* atas alasan-alasan yang disenaraikan di dalamnya. Dalam kes ini, bahagian-bahagian s 70 yang relevan hanyalah sub-s (a), yang mana di bawahnya

perkahwinan akan boleh terbatal di mana tidak ada penyempurnaan oleh sebab ketidakupayaan untuk menyempurnakannya, atau sub-s (b), di mana tidak ada penyempurnaan oleh sebab keengganan yang disengajakan oleh penentang untuk menyempurnakannya (lihat ms 485G–H). A

(4) Di bawah s 70(a), perkara kritikal untuk dipertimbangkan ialah kemampuan mengadakan hubungan persetubuhan, dan bukan kemampuan menghasilkan zuriat. Tahap hubungan persetubuhan yang diperlukan ialah keupayaan untuk *vera copula*, iaitu kemampuan bersetubuh yang biasa dan sempurna, dan bukan insipien, yang kurang sempurna dan yang luar tabie. Sama ada atau tidak pihak-pihak pernah mengadakan hubungan persetubuhan yang biasa sebelum perkahwinan adalah tidak relevan. Apa yang dipertikaikan adalah sama ada pihak-pihak mampu mengadakan hubungan persetubuhan selepas perkahwinan (lihat ms 486A–C); *Baxter v Baxter* [1948] AC 274, *D v D* (1845) 1 Rob Eccl 279, *R v R* (otherwise *F*) [1952] 1 All ER 1194, *SY v SY* [1963] P 37 dan *Dredge v Dredge* (otherwise *Harrison*) [1947] 1 All ER 29 diikut. B C D

(5) Adalah tersirat dalam sesuatu perjanjian perkahwinan bahawa pihak-pihak mempunyai keupayaan untuk menyempurnakan perkahwinan dengan bersatu. Perkataan 'ketidakmampuan' dalam s 70(a) Akta tersebut bererti tidak berkeupayaan untuk mengadakan hubungan persetubuhan berdasarkan kelumpuhan secara fizikal atau mati pucuk kerana sebab psikologi. Tidak menjadi hal bahawa penentang mempunyai keupayaan mengadakan hubungan jenis dengan orang lain. Suatu pihak yang menghadapi kebencian yang tidak terhingga yang tidak dapat diatasi terhadap perbuatan persetubuhan dengan pasangannya boleh dianggap sebagai tidak mampu menyempurnakan perkahwinan. Keputusan rasional untuk tidak membenarkan persetubuhan tidak mencukupi dan mesti terdapat unsur psikologi atau keberatan persetubuhan. Ia merupakan kewajipan pempetisyen untuk membuktikan bahawa ketidakmampuan wujud (lihat ms 486D–F); *Dickinson v Dickinson* (otherwise *Phillips*) [1913] P 198, *L v L* [1956] MLJ 145, *W* (otherwise *K*) *v W* [1967] 1 WLR 1554 dan *Singh v Singh* [1971] P 226 diikut. E F G H

(6) Dalam kes sekarang, pempetisyen tidak mendedahkan apa-apa bukti ketidakupayaan pihak-pihak untuk menyempurnakan perkahwinan berdasarkan kepada undang-undang yang dirujuk. Keterangan yang ada hanyalah menyatakan bahawa tidak ada penyempurnaan perkahwinan disebabkan oleh keadaan-keadaan I

di luar jangkaan. Ini dengan sendirinya tidak membawa ketidaksempurnaan itu dalam rangkuman s 70(a) (lihat ms 486H).

(7) Berkenaan dengan suatu petisyen di bawah s 70(b) Akta tersebut, pempetisyen hendaklah menunjukkan keengganan yang disengajakan untuk menyempurnakan perkahwinan. Untuk kengganan yang disengajakan wujud, hendaklah terdapat kengganan untuk menyempurnakan tanpa alasan yang adil. Petisyen yang berasaskan kepada keengganan yang disengajakan mesti ditolak jika penentang boleh menunjukkan 'alasan yang adil' untuk enggan menyempurnakan. (lihat ms 487B); *Horton v Horton* [1947] 2 All ER 871 dan *Jodla v Jodla* (otherwise *Czarnomska*) [1960] 1 All ER 625 diikut.

(8) Dalam kes ini, keterangan yang ada hanya mendedahkan bahawa perkahwinan itu tidak disempurnakan kerana kedua-dua pihak tidak menjalani perkahwinan mengikut adat resam disebabkan oleh keadaan-keadaan diluar jangkaan. Ini adalah tidak memadai untuk membuktikan bahawa perkahwinan itu tidak disempurnakan tanpa alasan yang adil (lihat ms 487I).]

Notes

For cases on nullity, see 7 Mallal's Digest (4th Ed, 1995 Reissue) paras 2173–2184

Cases referred to

Baxter v Baxter [1948] AC 274
Cheng Sun Chuen v Lee Chee Seng [1983] 2 MLJ 371
D v D (1845) 1 Rob Eccl 279
Dickinson v Dickinson (otherwise *Phillips*) [1913] P 198
Dredge v Dredge (otherwise *Harrison*) [1947] 1 All ER 29
Horton v Horton [1947] 2 All ER 871
Jodla v Jodla (otherwise *Czarnomska*) [1960] 1 All ER 625
Kaur v Singh [1972] 1 WLR 105
L v L [1956] MLJ 145
Potter v Potter [1975] 5 Fam Law 161
R v R (otherwise *F*) [1952] 1 All ER 1194
Rathee v Shanmugam [1981] 1 MLJ 263
Singh v Singh [1971] P 226
SY v SY [1963] P 37
Tan Siew Choon v Tan Kai Ho [1973] 2 MLJ 9
Tan Siew Hong v Chai Tze Yuk [1987] 1 MLJ 520
W (otherwise *K*) *v W* [1967] 1 WLR 1554

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 67, 68, 69, 70, 73(1)

Aslam bin Zainuddin (Assistant Director, Legal Aid Bureau, Melaka) for the petitioner. A

Respondent absent.

Augustine Paul JC: This is a petition for a decree of nullity of marriage by Yong Fui Phin, the petitioner, under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The petitioner, who is ordinarily domiciled in Malaysia, was lawfully married to Lim Tow Siew, the respondent, on 5 May 1995 at the Registry of Civil Marriages, Melaka Tengah, Melaka. The facts as contained in the statement to the petition are as follows: B

(a) At the time of the registration of the marriage, it was mutually agreed that both parties would continue to live separately until a wedding ceremony under Chinese customary rites was celebrated at a later date. C

(b) Due to unforeseen circumstances, both parties did not go through the customary marriage. The marriage was never consummated and the petitioner and the respondent have never cohabited.

Accordingly, the petitioner prayed for an order, inter alia, that the said marriage be declared null and void. The petition was served on the respondent on 30 May 1996. However, he did not appear in court on 15 August 1996 when the petition was called up for hearing. D

I then considered whether the petitioner was entitled to the prayer sought under the relevant provisions of the Act. E

Section 68 of the Act provides that any husband or wife may present a petition to the court praying for a decree of nullity in respect of his or her marriage. A decree of nullity may be granted on the ground that the marriage is void as specified in s 69 of the Act, or when it is voidable under s 70 of the Act. Section 73(1) of the Act enunciates that a court shall pronounce a decree of nullity only if it finds that the petitioner's case has been proved. Section 67 of the Act mandates that a decree of nullity may only be made: F

(a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and G

(c) where both the parties to the marriage reside in Malaysia at the time of the commencement of the proceedings.

It is clear that there must be compliance with either sub-s (a) or (b) together with sub-s (c) of s 67 in order for the court to make the order sought. In this regard, reference may be made to *Cheng Sun Chuen v Lee Chee Seng* [1983] 2 MLJ 371, where Yusoff Mohamed J (as he then was) said at p 372: H

> Now, with the passing of the new Law Reform (Marriage and Divorce) Act 1976, my view is fortified in that with effect from 1 March 1982, the courts cannot under s 67 of the Act grant a decree of nullity of a marriage unless I

A both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced.

In the petition before me, s 67(a) has been satisfied. With regard to s 67(c), the only statement is that 'the petitioner is ordinarily domiciled in Malaysia'.

B There is nothing on record to show that both the parties to the marriage resided in Malaysia at the time of the commencement of the proceedings. This is fatal to the petition.

The main issue for consideration is the grounds on which the petition was based. The petitioner was seeking a decree of nullity on the ground C that the marriage was not consummated as both parties did not go through the customary marriage due to unforeseen circumstances. The reason advanced by her must fall within the relevant provisions of s 70 of the Act, which read as follows:

> A marriage which takes place after the appointed date shall be voidable on D the following grounds only, that is to say —
>
> (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
>
> (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;
>
> E (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
>
> (d) that at the time of the marriage either party, though capable of giving a valid consent, was (whether continuously or intermittently) a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 of such a kind or to such an extent as to be unfit for marriage;
>
> F
>
> (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
>
> (f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

G The section makes it manifestly patent that a marriage shall be voidable *only* on any of the grounds listed therein. A petition anchored on any other ground would therefore not qualify for a decree of nullity. For the purposes of the petition before me, the relevant parts of s 70 are only sub-ss (a) and (b) — under which a marriage shall be voidable where there is non-consummation due to the incapacity of either party to consummate it or by H reason of the wilful refusal of the respondent to consummate it.

I shall now consider whether the petitioner's case falls under these circumstances.

(a) Incapacity to Consummate

I Section 70(a) of the Act is a codification of a basic principle of the common law that a marriage is voidable if, owing to the incapacity of

either party, it has not been consummated. For this purpose, the critical matter for consideration is the ability to have sexual relations and not the ability to procreate. The fact that a party is strile or barren is irrelevant (see *Baxter v Baxter* [1948] AC 274). The degree of sexual relationship that is required is capacity for *vera copula*, intercourse which is 'ordinary and complete' and not 'incipient, imperfect and unnatural' (see *D v D* (1845) 1 Rob Eccl 279). This means that there must be erection and penetration for a reasonable length of time (see *R v R* (otherwise *F*) [1952] 1 All ER 1194) though it is not necessary for either party to be capable of orgasm (see *SY v SY* [1963] P 37). The fact that the parties have had normal intercourse prior to the marriage ceremony is irrelevant. What is in issue is whether the marriage has been consummated, which requires intercourse after the marriage (see *Dredge v Dredge* (otherwise *Harrison*) [1947] All ER 29).

A contract of marriage implies that the parties have the capacity to consummate it (see *Dickinson v Dickinson* (otherwise *Phillips*) [1913] P 198). The word 'incapacity' to consummate in s 70(a) means, and can only mean, inability to have sexual intercourse based on physical abnormality or psychological impotence (see *L v L* [1956] MLJ 145). It is immaterial if the impotence may only be *quoad hunc* or *hanc* — ie, that the respondent is capable of having intercourse with other partners (see *R v R* (otherwise *F*) [1952] 1 All ER 1194; *W* (otherwise *K*) *v W* [1967] 1 WLR 1554). A spouse who suffers from invincible repugnance to the act of intercourse with the other may thus be regarded as incapable of consummating the marriage (see *SY v SY* [1963] P 37). However, a rational decision not to permit intercourse is insufficient and there must be some element of psychological or sexual aversion. In this regard, Karminski LJ said in *Singh v Singh* [1971] P 226 at p 232:

> The petitioner, a 17-year old Sikh girl, reluctantly went through a marriage ceremony arranged by her parents with a man she had never previously met. She never submitted to the physical embraces of the husband, because ... it does not appear that she saw him again. Having taken the view ... that she did not want to be married to him it is understandable that she did not want to have sexual intercourse with him; but that ... seems to be a very long way from an invincible repugnance ...

It is for the petitioner to prove that the incapacity exists. The petitioner before me did not disclose any evidence of incapacity of the parties to consummate the marriage in the light of the law adverted to. The available evidence only indicates that there was no consummation of the marriage due to unforeseen circumstances. That on its own does not bring the non-consummation within the ambit of s 70(a) of the Act.

(b) Wilful Refusal to Consummate

The phrase 'wilful refusal to consummate' arose for consideration before Lord Jowitt LC in *Horton v Horton* [1947] 2 All ER 871. His Lordship had this to say at p 874:

> My Lords, I do not think it desirable to attempt any definition of the phrase 'wilful refusal to consummate the marriage'. The words connote, I think, a settled and definite decision come to without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage.

In *Jodla v Jodla* (otherwise *Czarnomska*) [1960] 1 All ER 625, Hewson J referred to *Horton's* case and said that for there to be a wilful refusal, there must be a refusal to consummate without just excuse. It therefore follows that a petition based on wilful refusal must be dismissed if the respondent can show a 'just excuse' for the refusal to consummate. Thus, if the parties have agreed that a civil marriage shall be followed by a religious ceremony, it is a 'just excuse' for refusing to consummate the marriage on the ground that the religious ceremony has not taken place (see *Principles of Family Law* by SM Cretney and JM Masson (5th Ed) at p 53).

Be that as it may, a party's refusal to go through the religious ceremony is a failure to implement the agreement and by itself amounts to a wilful refusal to consummate the marriage. In *Kaur v Singh* [1972] 1 WLR 105, a marriage was arranged between two Sikhs. A civil ceremony took place, but by Sikh religion and practice, a religious ceremony was necessary in order to marry. Although it was the husband's duty to arrange for the religious ceremony, he refused to make the necessary arrangements. It was held that the wife was entitled to a decree on the ground of his wilful refusal to consummate. In *Jodla v Jodla* (otherwise *Czarnomska*) [1960] 1 All ER 625 the parties, who were Roman Catholics, married at a registry office but agreed that they would have a church ceremony before the marriage could be consummated. The wife made several requests to the husband to proceed with the church ceremony but he refused. It was held that the wife would be granted a decree of nullity because the wilful refusal to consummate the marriage was the husband's, as he had failed to arrange for a church ceremony. Such wilful refusal on the part of the husband would have been just cause for the wife — having regard to their faith — to have refused intercourse if it had ever been requested. See also *Tan Siew Choon v Tan Kai Ho* [1973] 2 MLJ 9; *Rathee v Shanmugam* [1981] 1 MLJ 263 and *Tan Siew Hong v Chai Tze Yuk* [1987] 1 MLJ 520. On the other hand, in *Potter v Potter* (1975) 5 Fam Law 161, the failure to consummate the marriage originally resulted from a physical defect in the wife. This was cured by surgery. The husband then made one further attempt to consummate the marriage, but the wife's emotional state following the operation was such that this was unsuccessful. Thereafter, the husband refused to make any further attempts. The wife failed in a petition alleging his wilful refusal. It was held that his failure to consummate resulted from natural, and not deliberate, loss of ardour.

The petitioner had not shown that there was wilful refusal to consummate the marriage. The available evidence only disclosed that the marriage was not consummated as both parties did not go through the customary marriage due to unforeseen circumstances. This was insufficient to establish that the marriage was not consummated without just excuse —

that is to say, that there was wilful refusal by the respondent pursuant to s 70(b) of the Act.

In the upshot, I dismissed the petition as the petitioner had failed to comply with the requirements of ss 67(c) and 70(a) or (b) of the Act.

Petition dismissed.

Reported by Aslam Zainuddin